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MOTION FILED

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No. 08-250

In The

Supreme Court of the United States

CHARLES and CATHERINE BRAUN, husband and wife, and EDWARD and MURIEL PARDON, husband and wife,

Petitioners,

v.

ANN ARBOR CHARTER TOWNSHIP,

Respondent.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE AMICI CURIAE AND BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND FRANKLIN P. KOTTSCHADE IN SUPPORT OF PETITIONERS

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September 24, 2008

MOTION TO FILE *AMICUS* BRIEF IN SUPPORT OF PETITIONER

Pursuant to this Court's Rule 37.2(b), the National Association of Home Builders (NAHB) and Franklin P. Kottschade respectfully request leave of this Court to file their brief *amici curiae* in support of Petitioners.[1] Petitioners' counsel filed a blanket consent letter with the Court on September 11, 2008. *Amici* requested consent from Respondent; however, on September 9, 2008, its counsel informed that he could not authorize consent.

NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent and affordable housing. As the voice of America's housing industry, NAHB helps promote policies that will keep housing a national priority. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's 235,000 members are home builders and/or remodelers, and its builder members construct about 80 percent of the new homes constructed each year in the United States. The remaining members are associates

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. One Letter of consent is on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

working in closely related fields within the housing industry, such as mortgage finance and building products and services.

To effectuate its mission, NAHB strives to create an environment in which all Americans have access to the housing of their choice, and builders have freedom to operate as entrepreneurs in an open and competitive market. Toward this end, NAHB is a vigilant advocate in the Nation's courts, and it frequently participates as a party litigant and *amicus curiae* to safeguard the property rights and interests of its members. NAHB was a petitioner in *NAHB v. Defenders of Wildlife*, 127 S.Ct. 2518 (2007). It has also participated before this Court as *amicus curiae* or "of counsel" in a number of cases involving landowners aggrieved by over-zealous regulation under a wide array of statutes and regulatory programs.[2]

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[2] These include: *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v.*

NAHB's organizational policies have long supported the rights of property owners to have their constitutional claims heard by federal courts. NAHB is disturbed that the federal courts are interpreting this Court's decision in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (*Williamson*), in a manner that always relegates property owners with legitimate Fifth Amendment takings claims to litigate them only in state court.

Mr. Kottschade is a homebuilder and developer who has attempted to have his takings claims heard in federal court. After months of negotiating with local officials regarding the use of property he owns in the Rochester, Minnesota, the City imposed financially ruinous conditions on his proposed project to develop affordable residential townhomes. He thus

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Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370 (2006); *Rapanos v. United States*, 547 U.S. 715 (2006); *John R. Sand and Gravel Co. v. United States*, 128 S.Ct. 750 (2008); *Summers v. Earth Island Inst.*, 490 F.3d 687 (9th Cir. 2007), *cert. granted*, 128 S. Ct. 1118 (2008) (No. 07-463); *Entergy Corp. v. Envtl. Prot. Agency*, 475 F.3d 83 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1867 (2008) (consol. with Nos. 07-589 and 07-597); *Winter v. Nat. Res. Def. Council*, 518 F.3d 658 (9th Cir. 2008), *cert. granted*, 128 S. Ct. 2964 (2008) (No. 07-1239); and *Coeur Alaska, Inc. v. S.E. Alaska Cons. Council*, 486 F.3d 638 (9th Cir. 2007), *cert. granted*, 128 S. Ct. 2995 (2008) (No. 07-984, consol. with 07-990).

filed suit in federal court in June 2001, seeking just compensation for a taking of his property under the Fifth Amendment.

However, the federal courts dismissed his case for not being ripe. In 2003, the Court of Appeals for the Eighth Circuit expressed some sympathy for the jurisdictional Catch-22 that *Williamson* causes for takings plaintiffs, but its understanding only went so far and it denied Mr. Kottschade federal court access. *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir. 2003) (state-litigation rule has created an "anomalous ... gap in Supreme Court jurisprudence"). Subsequently, this Court denied Mr. Kottschade's petition for certiorari. 540 U.S. 825 (2003). He remains mired in litigation, now in state court, and has yet to receive a decision on the merits from *any* court. To bring attention to the jurisprudential dilemma caused by *Williamson*, Mr. Kottschade has testified before Congress to advocate for legislative reform measures that would confer upon property owners the right to federal court adjudication on Fifth Amendment takings claims. See *Private Property Rights Implementation Act of 2005: Hearing on H.R. 4772 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Franklin P. Kottschade, President, North American Realty).

The proposed brief urges this Court to grant the petition by demonstrating the contradictions that exist between *Williamson* and the Court's other cases regarding federal court jurisdiction over takings

claims.[3] Furthermore, we explain how these conflicting opinions cause a trap for takings plaintiffs and how Mr. Kottschade has been, unfortunately, ensnared.

Accordingly, NAHB respectfully requests that this motion, and the petition, be granted.

September 24, 2008

Respectfully submitted,

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[3] *E.g.*, *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323 (2005), *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156 (1997).

TABLE OF CONTENTS

Page(s)

MOTION TO FILE *AMICUS* BRIEF IN SUPPORT OF PETITIONER i

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. THE PETITION PROVIDES AN APPROPRIATE VEHICLE TO REEVALUATE THE STATE-LITIGATION RULE 2

A. *Williamson*: The State-Litigation Rule 2

B. *San Remo*: The State-Litigation Rule Meets Issue Preclusion 3

C. Unlike *San Remo*, This Case Squarely Questions the Validity of the State-Litigation Rule 6

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONTRADICTIONS IN THIS COURT'S TAKINGS CASES AND CONFLICTS IN THE LOWER COURTS — ALL ARISING FROM THE STATE-LITIGATION RULE 8

TABLE OF CONTENTS (*cont.*)

Page (s)

A. Contradictions in This Court's Takings Cases 8

1. Conflict Between *Williamson* and *San Remo* 8

2. Conflict With This Court's Decision on Removal Jurisdiction in *City of Chicago* 11

3. Conflict With This Court's Decision on Seventh Amendment Rights in *Del Monte Dunes* 12

B. Conflict in the Circuit Courts 13

1. Circuit Conflict on Claim Preclusion 13

2. Circuit Conflict on Removal Jurisdiction 15

3. Circuit Conflict on Application of State-Litigation Rule to Other Constitutional Claims 16

III. *AMICUS* FRANKLIN KOTTSCHADE'S LITIGATION SAGA PERFECTLY ILLUSTRATES THE *WILLIAMSON* TRAP 18

A. The City Imposes Financially Ruinous Conditions on Mr. Kottschade's Development Application, and He Initiates the Federal Suit 19

TABLE OF CONTENTS (*cont.*)

Page (s)

B. The Eighth Circuit Affirms Dismissal of Mr. Kottschade's Federal Takings Case 21

C. Mr. Kottschade Remains Stuck in *Williamson*'s Procedural Quagmire — In State Court 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

Agripost, Inc. v. Miami-Dade County, 195 F.3d 1225, (11th Cir. 1999), *cert. denied*, 531 U.S. 815 (2000) 9

Asociacion de Subscripcion Conjunta del Seguro de Responsabilidad Obligatorio, v. Flores Galarza, 484 F.3d 1 (1st Cir. 2007) 9

Bateman v. City of W. Bountiful, 89 F.3d 704 (10th Cir. 1996) 18

Border Bus. Park, Inc. v. City of San Diego, 49 Cal. Rptr. 3d 259 (Cal. Ct. App. 2007), *cert. denied*, 127 S. Ct. 2280 (2007) 1-2

Braun v. Ann Harbor Charter Twp., 519 F.3d 564 (6th Cir. 2008) 6, 17

Brubaker v. E. Hempfield Twp., 234 Fed. Appx. 32 (3d Cir. 2007) 9

Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 226 (1897) 13

City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156 (1997) 11, 12

City of Marion v. Howard, 855 N.E. 2d 994 (Ind. 2006), *cert. denied*, 126 S. Ct. 2358 (2006) 2

TABLE OF AUTHORITIES (*cont.*)

Page(s)

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 12, 13

County Concrete Corp. v. Town of Roxbury, 442 F.3d 159 (3d Cir. 2006) 17

DLX, Inc. v. Kentucky, 381 F.3d 511 (6th Cir. 2004) 14

Dodd v. Hood River County, 59 F.3d 852 (9th Cir. 1995) 14

Dolan v. City of Tigard, 512 U.S. 374 (1994) 20, 21, 24

First English Evangelical Lutheran Church of Glendale v. Los Angeles, 482 U.S. 304 (1987) 24

Forseth v. Vill. of Sussex, 199 F.3d 363 (7th Cir. 2000) 17

Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal, Va., 135 F.3d 275 (4th Cir. 1998) 17

Henry v. Jefferson County Planning Comm'n, 34 Fed. Appx. 92 (4th Cir. 2002) 9

Hillsboro Props. et al. v. City of Rohnert Park et al., 41 Cal. Rptr. 3d 441 (Cal. Ct. App. 2006), *cert. denied*, 127 S. Ct. 836 (2006) 2

Int'l Coll. of Surgeons v. City of Chicago, 153 F.3d 356 (7th Cir. 1998) 15, 21

TABLE OF AUTHORITIES (*cont.*)

Page(s)

Johnson v. City of Shorewood, --- N.W.2d ----, 2008 WL 434680 (Minn. Ct. App. 2008), *petition for cert. filed*, 77 U.S.L.W. 3075 (U.S. Jul. 28, 2008) (No. 08-127) 1

Jones v. City of McMinnville, 244 Fed. Appx. 755, 2007 WL 1417293 (9th Cir. 2007) 15

Koscielski v. City of Minneapolis, 435 F.3d 898 (8th Cir. 2006) 15

Kottschade v. City of Rochester, 319 F.3d 1038 (8th Cir.), *cert. denied*, 540 U.S. 825 (2003) 6, 9, 21-22

McKenzie v. City of White Hall, 112 F.3d 313 (8th Cir. 1997) 17

McNamara v. City of Rittman, 473 F.3d 633 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 67 (2007) 2, 6

Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) 20, 21

Ochoa Realty Corp. v. Faria, 815 F.2d 812 (1st Cir. 1987) 17

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 20, 23

Peduto v. City of N. Wildwood, 878 F.2d 725 (3d Cir. 1989) 14

TABLE OF AUTHORITIES (*cont.*)

Page(s)

Peters v. Fair, 427 F.3d 1035 (6th Cir. 2005) 9

Peters v. Vill. of Clifton, 498 F.3d 727 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 1472 (2008) 2, 9

Rockstead v. City of Crystal Lake, 486 F.3d 963 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 415 (2007) 2, 14

Rocky Mountain Materials & Asphalt, Inc. v. Bd. of County Comm'rs of El Paso County, 972 F.2d 309 (10th Cir. 1992) 18

Samaad v. City of Dallas, 940 F.2d 925 (5th Cir. 1991) 9

San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005) ..... *passim*

Sandy Creek Investors, Ltd. v. City of Jonestown, 325 F.3d 623 (5th Cir. 2003) 16

Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118 (2d Cir. 2003) 14

Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398 (9th Cir. 1989) 17

Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401 (9th Cir. 1996), *cert. denied*, 523 U.S. 1059 (1998) 9

TABLE OF AUTHORITIES (*cont.*)

Page(s)

Southview Assocs., Ltd. v. Bongartz, 980 F.2d 84 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993) 9

Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997) 2

Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) 16

Torromeo v. Town of Fremont, N.H., 438 F.3d 113 (1st Cir. 2006), *cert. denied*, 127 S. Ct. 257 (2006) 2

Wilkinson v. Pitkin County Bd. of Comm'rs, 142 F.3d 1319 (10th Cir. 1998) 6, 14

Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) .... *passim*

Yaklich v. Grand County, 2008 WL 1986470, (10th Cir. 2008) 9

STATUTORY PROVISIONS

Statutes

28 U.S.C. § 1441(a) 11

28 U.S.C. § 1731 4

42 U.S.C. § 1983 .... 16, 22

TABLE OF AUTHORITIES (*cont.*)

Page(s)

OTHER

Michael Berger & Gideon Kanner, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671 (Fall 2004) 5

John Delaney & Duane Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform so Takings Plaintiffs can Enter the Federal Courthouse*, 31 Urb. Law. 195 (Spring 1999) 4

Steven J. Eagle, *Regulatory Takings*, 1062, 2d ed. (2001) 9

Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239 (2000) 9-10

Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37 (1995) 9

Private Prop. Rights Implementation Act of 2005: Hearing on H.R. 1534 Before the Subcomm. on Courts and Intellectual Prop. of the H. Judiciary Comm., 105th Cong. 67 (1997) (test. of Prof. Daniel R. Mandelker), *reprinted in* 31 Urb. Law. 234 (Summer 1999) 4

SUMMARY OF ARGUMENT

This matter provides another opportunity for the Court to clarify the confusion regarding ripeness for claims under the Fifth Amendment's Takings Clause. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), established the rule that a takings claim does not become ripe for federal court adjudication until the aggrieved property owner pursues inverse condemnation litigation in state court. Four concurring Justices in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005), stated that this state-litigation rule "may have been mistaken," and that "[i]t is not clear that *Williamson County* was correct in demanding" that a claimant must first seek a compensation remedy through state litigation as a prerequisite to ripen a federal takings claim. *Id.* at 348-349 (Rehnquist, C.J., concurring). The *San Remo* concurring Justices believed that *Williamson*'s "state-litigation rule has created some real anomalies, justifying our revisiting the issue." *Id.* at 351.

The court of appeals' decision provides the opportunity "revisit" the "real anomalies" created by *Williamson*. The state-litigation rule has been thoroughly aired in the lower federal and state courts. The Court has denied at least seven petitions for certiorari, requesting review of *Williamson*, since its decision in *San Remo*; one pending petition asks a similar question.[1] Postponing review will not

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[1] See *Johnson v. City of Shorewood*, ---N.W.2d----, 2008 WL 434680 (Minn. Ct. App. 2008), *petition for cert. filed*, 77 U.S.L.W. 3075 (U.S. Jul. 28, 2008) (No. 08-127), *Border Bus. Park, Inc. v. City of San Diego*, 49 Cal. Rptr. 3d 259 (Cal. Ct. App. 2007), *cert.*

contribute to resolution of the open questions generated by *Williamson*, inconsistencies within this Court's takings jurisprudence will linger, and conflicting lower court decisions will proliferate. Respectfully, NAHB encourages this Court to grant the petition, reconsider the state-litigation element of *Williamson*'s ripeness doctrine — and dispense with it.

ARGUMENT

I. THE PETITION PROVIDES AN APPROPRIATE VEHICLE TO RE-EVALUATE THE STATE-LITIGATION RULE.

A. *Williamson:* The State-Litigation Rule.

"There are two independent prudential hurdles" to ripen a takings claim. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-34 (1997). These were established in *Williamson*. First, takings claims are not ripe "until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular

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denied, 127 S. Ct. 2280 (2007), *Hillsboro Props. et al. v. City of Rohnert Park et al.*, 41 Cal. Rptr. 3d 441 (Cal. Ct. App. 2006), *cert. denied*, 127 S. Ct. 836 (2006), *Rockstead v. City of Crystal Lake*, 486 F.3d 963 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 415 (2007), *Torromeo v. Town of Fremont, N.H.*, 438 F.3d 113 (1st Cir. 2006), *cert. denied*, 127 S. Ct. 257 (2006), *Peters v. Vill. of Clifton*, 498 F.3d 727 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 1472 (2008), *McNamara v. City of Rittman*, 473 F.3d 633 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 67 (2007), *City of Marion v. Howard*, 855 N.E. 2d 994 (Ind. 2006), *cert. denied*, 126 S. Ct. 2358 (2006).

land in question." *Williamson*, 473 U.S. at 191. This "finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury ...." *Id.* at 193. The finality requirement is not at issue.

Williamson's second ripeness requirement is called into question here: "[If] a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and has been denied just compensation." *Id.* at 195. Concurring in *San Remo*, the late Chief Justice Rehnquist, joined by former Justice O'Connor and Justices Kennedy and Thomas, labeled this requirement the "state-litigation rule." *San Remo*, 545 U.S. at 349, (Rehnquist, C.J., concurring). They described the rule as follows: "Until the claimant had received a final decision of compensation through all available state procedures, such as by an inverse condemnation action ... he 'could not claim a violation of the Just Compensation Clause.'" *Id.* at 349 (citing *Williamson*, 473 U.S. at 195-196).

B. *San Remo:* The State-Litigation Rule Meets Issue Preclusion.

San Remo did not directly address the validity of the state-litigation rule. Rather, the question was whether a takings claimant, in initial state litigation, could reserve a Fifth Amendment claim for subsequent federal adjudication. *San Remo* ruled that such a reservation was inappropriate, resolving a circuit split on that point. *Id.* at 337-338. The Court

further held it was "not free to disregard the full faith and credit statute [28 U.S.C. § 1731] solely to preserve the availability of a federal forum" after initial state litigation mandated by *Williamson*. *Id.* at 347. Issue preclusion was thus held to bar relitigation in federal court after a "state court actually decided an issue of fact or law that was necessary to its judgment" — even if a takings plaintiff "would have preferred not to litigate [first] in state court, but was required to do so by statute or prudential rules." *Id.* at 342.

The *San Remo* concurrence was concerned that the Court's holding regarding issue preclusion "ensures that litigants who go to state court to seek compensation will likely be unable later to assert their federal takings claims in federal court ...." *Id.* at 351 (Rehnquist, C.J., concurring).[2] Takings law experts have put the problem this way:

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[2] This is exactly what has transpired. By the mid-1990s, the lower federal courts overwhelmingly invoked the state-litigation rule to avoid adjudicating the merits of Fifth Amendment takings claims. See John Delaney and Duane Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform so Takings Plaintiffs can Enter the Federal Courthouse*, 31 Urb. Law. 195, 203-205 (Spring 1999) (surveying all land-use takings cases with a federal court decision from 1990-1998). As a preeminent takings scholar testified before Congress, the lower federal courts have exhibited "wholesale abdication of federal jurisdiction" over Fifth Amendment claims and have achieved the "undeserved and unwarranted result [of] avoid[ing] the vast majority of takings cases on their merits." *Private Prop. Rights Implementation Act of 2005: Hearing on H.R. 1534 Before the Subcomm. on Courts and Intellectual Prop. of the H. Judiciary Comm.*, 105th Cong. 67 (1997) (test. of Prof. Daniel R. Mandelker), *reprinted in* 31 Urb. Law. 234 (Summer 1999).

> [A]s a reward for following the rules and trying to ripen their federal claims in state court as spelled out by *Williamson County*, property owners have the rug yanked out from under them by federal courts saying the door to that courthouse is now closed, because the very act of "ripening" the case actually sounded its death knell.

Michael Berger and Gideon Kanner, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671, 687 (Fall 2004).

The preclusive effect of state takings decisions, causing the virtual wholesale relinquishment of jurisdiction by the federal courts over Fifth Amendment takings claims, prompted the *San Remo* concurring Justices to question the state-litigation rule's propriety. They wrote it was not "clear" that *Williamson* "was correct in demanding that, once a government entity has reached a final decision with respect to a claimant's property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court." *San Remo*, 545 U.S. at 349 (Rehnquist, C.J., concurring). The concurrence doubted that "either constitutional or prudential principles" should first require exhaustion of all state compensation procedures before a claimant can vindicate Fifth Amendment rights. *Id.* The concurring Justices acknowledged that *Williamson*'s "state-litigation rule has created some

real anomalies, justifying our revisiting the issue." *Id.* at 351.[3]

C. Unlike *San Remo*, This Case Squarely Questions the Validity of the State-Litigation Rule.

The decision below provides a textbook example of *Williamson*'s effect in barring federal courts from deciding Fifth Amendment takings claims on their merits. While the state-litigation rule was not teed-up for this Court's consideration in *San Remo*, it is directly in play in the case at bench. Here, Petitioners' could no longer operate profitable farms. *Braun v. Ann Harbor Charter Township*, 519 F.3d 564, 567 (6th Cir. 2008). They thus sought approval from the township to use their property for residential housing. *Id.* After the town's officials denied Petitioners' request for rezoning, they filed a takings and due process suit in state court. The trial court and the Michigan Court of Appeals, however, held that the case was not ripe because the Petitioners had not received a final decision. Thereafter, they

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[3] The lower courts would agree. See, *e.g.*, *McNamara v. City of Rittman*, 473 F.3d 633, 640 (6th Cir.) ("It may seem a bit perverse that one takings claim (past violations) be barred by statute of limitations because it was delinquently filed in federal court, and yet a similar claim (continuing violations) be barred by ripeness because it was prematurely filed in federal court"), *cert. denied*, ___ U.S. ___ (2007); *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir.) (state-litigation rule has created an "anomalous ... gap in Supreme Court jurisprudence"), *cert. denied*, 540 U.S. 825 (2003); *Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319, 1325 n. 4 (10th Cir. 1998) ("It is difficult to reconcile the [state litigation] ripeness requirement of *Williamson*" with issue and claim preclusion).

obtained their final decision by seeking a variance — which was denied. *Id.* at 567-69.

Still unable to put their property to economically viable use, the landowners brought suit in federal court. Again, they claimed violations of the Fifth and Fourteenth Amendments. However, avoiding the merits, both the district court and court of appeals dismissed the suit for lack of jurisdiction. The courts explained that to ripen their claims, *Williamson* required the Petitioners to first litigate them in state court. *Id.*

In *San Remo,* many *amici* (including NAHB) urged the Court to directly confront *Williamson.* But the invitation was declined because "no court below ha[d] addressed the correctness of *Williamson County,* neither party ha[d] asked us to reconsider it, and resolving the issue could not [have] benefit[ed] petitioners." *Id. San Remo,* 545 U.S. at 352. (Rehnquist, C.J., concurring). The converse is true here. First, the court of appeals *did* consider *Williamson*'s impact, and second, one of the petition's questions plainly asks the Court to reassess the state-litigation rule.

Third, resolving the issue would benefit Petitioners. If the Court reconsiders the state-litigation rule and removes it from the ripeness landscape, Petitioners would receive a federal adjudication on whether the township violated their rights under the Fifth and Fourteenth Amendments of the Constitution.

In short, this is an "appropriate case" to "reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts." *San Remo*, 545 U.S. at 352 (Rehnquist, C.J., concurring).

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONTRADICTIONS IN THIS COURT'S TAKINGS CASES AND CONFLICTS IN THE LOWER COURTS — ALL ARISING FROM THE STATE-LITIGATION RULE.

The *San Remo* concurring Justices acknowledged that *Williamson*'s "state-litigation rule has created some real anomalies, justifying our revisiting the issue." *Id.* at 351. Those anomalies include contradictions within this Court's own takings decisions, as well as divisions among the circuit courts of appeal.

A. Contradictions in This Court's Takings Cases.

1. Conflict Between *Williamson* and *San Remo*. Tension is especially pronounced between *Williamson* and *San Remo*. The *Williamson* Court stated that exhaustion of state compensation procedures is a first step to ripen federal takings claims: "*[U]ntil* [plaintiff] has utilized [state] procedure[s], its takings claim is *premature*." *Williamson*, 473 U.S. at 197 (emphasis

supplied).[4] Virtually every court of appeals has interpreted this language to mean that a Fifth Amendment takings claim is not ripe — it does not exist — until a property owner has filed suit for inverse condemnation in state court and has been denied compensation.[5] Many commentators also read *Williamson* as providing the opportunity for ultimate federal adjudication following denial of compensation in state court.[6]

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[4] See also *Williamson*, 473 U.S. at 194 ("A second reason the takings claim is *not yet ripe* is that respondent did not seek compensation through the procedures the state has provided for doing so") (emphasis supplied); *id.* at 195 ("the property owner cannot claim a violation of the Just Compensation Clause *until it has used* the [available state] procedure and been denied just compensation") (emphasis supplied).

[5] *E.g.*, *Asociacion de Subscripcion Conjunta del Seguro de Responsabilidad Obligatprio, v. Flores Galarza*, 484 F.3d 1, 16-19 (1st Cir. 2007); *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 99-100 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993); *Brubaker v. E. Hempfield Twp.*, 234 Fed. Appx. 32, 36-37 (3d Cir. 2007); *Henry v. Jefferson County Planning Comm'n*, 34 Fed. Appx. 92, 96 (4th Cir. 2002); *Samaad v. City of Dallas*, 940 F.2d 925, 933-36 (5th Cir. 1991); *Peters v. Fair*, 427 F.3d 1035, 1038 (6th Cir. 2005); *Peters v. Village of Clifton*, 498 F.3d 727, 731-734 (7th Cir 2007); *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir.), *cert. denied*, 540 U.S. 825 (2003); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 405-07 (9th Cir. 1996), *cert. denied*, 523 U.S. 1059 (1998); *Yaklich v. Grand County*, 2008 WL 1936470 at *4-*6 (10th Cir. 2008); *Agripost, Inc. v. Miami-Dade County*, 195 F.3d 1225, 1234 (11th Cir. 1999), *cert. denied*, 531 U.S. 815 (2000).

[6] See, *e.g.*, Steven J. Eagle, *Regulatory Takings*, 1062, 2d ed. (2001) ("The 'ripeness' metaphor is one that promises ultimate vindication"); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 67 (1995) ("the language ... suggests that the state law is merely preparatory to a federal suit"); Madeline J. Meacham,

The Court's opinion in *San Remo*, however, upends this widespread understanding. It declared that federal takings claims could, in fact, be asserted *during* a state lawsuit:

> The requirement that aggrieved property owners must seek "compensation through the procedures the State has provided for doing so" ... does not preclude state courts from hearing *simultaneously* a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution.

San Remo, 545 U.S. at 346 (citing *Williamson*, 473 U.S. at 194) (emphasis supplied). Thus, while *Williamson* rules that a federal takings claim is not ripe until *after* the state denies compensation, *San Remo* rules that federal claims can be brought *simultaneously* with state claims in state court.

So, which is the rule? Are *Williamson* and *San Remo* reconcilable, or in hopeless conflict? How is it that a Fifth Amendment claim can be brought simultaneously with a state inverse condemnation claim in state court, if that federal claim is not ripe until *after* the state denies compensation? How would the process of bringing simultaneous claims work? Should the state and federal takings claims be

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The Williamson Trap, 32 Urb. Law. 239, 249 (2000) ("language ... of *Williamson* suggests that a federal claim will survive after disposition in the state court").

brought in state court sequentially, in that order? Are they part of the same, or separate, lawsuits? What effect does *San Remo*'s simultaneous claim rule have on case law from the lower federal courts, cited *supra* n. 5, which have been virtually unanimous that they lack jurisdiction over Fifth Amendment takings claims until after state litigation is over? Are these opinions now overruled?

The petition should be granted so the Court can clarify the apparent contradictions between *Williamson*'s rule that state litigation is a condition precedent to ripen a federal takings claim, and *San Remo*'s rule that federal and state takings cases can be brought simultaneously in state court.

2. Conflict With This Court's Decision on Removal Jurisdiction in *City of Chicago.* Another anomaly is that the state-litigation rule is apparently irreconcilable with *City of Chicago v. Int'l Coll. of Surgeons,* 522 U.S. 156 (1997). There, a plaintiff brought both federal and state takings claims in state court. The city then removed the case to federal court. This Court, without discussing *Williamson*, allowed the removal to stand because "a case containing claims that local administrative action violates federal law ... is within the jurisdiction of the federal district courts." *Id.* at 528-529. Under the federal removal statute,[7] a case can be removed from state to federal court only if it could have been brought in federal court *originally*.

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[7] "[A]ny civil action brought in a State court of which the district courts of the United States have *original jurisdiction*, may be removed by the defendant ... to the district court." 28 U.S.C. § 1441(a) (emphasis supplied.)

Therein, the seeds of more conflict are sown. Under *Williamson*, federal courts do *not* have original jurisdiction over federal takings claims because they are not ripe until the property owner brings state litigation and loses. *San Remo* confirms that there is no original federal court jurisdiction over federal takings claims, and counsels that they may be brought simultaneously with state inverse condemnation claims in state court. Yet under *City of Chicago*, federal courts *do* have original jurisdiction over federal takings claims because a municipality has the right to remove them to federal court. The upshot is that federal courts decide federal takings claims only at the whim of municipal defendants who decide to exercise their removal option. The petition should be granted to address the dilemma created by *Williamson*, *San Remo*, and *City of Chicago*, as to whether federal courts do, in fact, possess "original jurisdiction" over Fifth Amendment takings claims.

3. Conflict With This Court's Decision on Seventh Amendment Rights in *Del Monte Dunes*. The state-litigation rule also generates friction with *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999). There, this Court held that takings plaintiffs in Section 1983 litigation have a Seventh Amendment right to a jury trial on issues of government liability. That is in stark contrast to the practice in state courts generally, which do not submit takings liability issues to juries. *Id.* at 719. If *Williamson* truly compels state litigation to ripen Fifth Amendment claims, and *San Remo* allows simultaneous litigation of federal and state takings claims in state court, then the Seventh Amendment rights confirmed by *Del Monte*

Dunes are illusory in states that do not provide jury trials on takings liability.

Unlike the Fifth Amendment, which was the first guarantee in the Bill of Rights to apply to the states through the Fourteenth Amendment, see *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897), "[i]t is settled law that the Seventh Amendment does not apply" to "suits decided by state court." *Del Monte Dunes*, 526 U.S. at 719. This Court's attention is needed to ensure that the state-litigation rule does not abrogate Seventh Amendment rights guaranteed by the United States Constitution.

B. Conflict in the Circuit Courts.

1. Circuit Conflict on Claim Preclusion. *San Remo*'s holding is arguably limited to issue preclusion or collateral estoppel.[8] However, the language in the Court's opinion is broad enough to encompass claim preclusion or *res judicata* as well.[9] In any event, there is a circuit conflict as to whether the state-litigation rule triggers *res judicata* to bar subsequent

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[8] See *San Remo*, 545 U.S. at 342 ("The relevant question ... is whether the state court actually decided an issue of fact or law that was necessary to its judgment"); *id.* at 343 ("... we are presently concerned only with issues actually decided by the state court[s] that are dispositive of federal claims raised under § 1983").

[9] *Id.* at 336 (full faith and credit statute "has long been understood to encompass the doctrines of res judicata, or 'claim preclusion,' and collateral estoppel, or 'issue preclusion'"); *id.* at 344 (federal courts may not "simply create exceptions" to full faith and credit statute and "depart[ ] from traditional rules of preclusion") (citations omitted).

federal takings claims. The Second, Sixth, and Ninth Circuits have decided that the *Williamson* requirement to initially litigate in state court does not extinguish Fifth Amendment *claims* subsequently filed in federal court.[10] As the Sixth Circuit observed in rejecting a claim preclusion defense: "[The] interaction of *Williamson County*'s ripeness requirements and the doctrine of claim preclusion could possibly operate to keep every regulatory takings claimant out of federal court." *DLX, Inc.*, 381 F.3d at 521. The Third, Seventh and Tenth Circuits disagree. Those Circuits extend claim preclusion to bar subsequent federal takings claims after mandatory state proceedings have resulted in the denial of compensation under state law.[11]

Significantly, the Ninth Circuit has plainly distinguished between issue and claim preclusion in the context of the state-litigation rule. In *San Remo*, 364 F.3d 1088, 1096 (9th Cir. 2004), it invoked *issue* preclusion to bar relitigation in subsequent federal proceedings, and this Court affirmed, 545 U.S. 323 (2005). But in *Dodd*, 59 F.3d at 869-70, the Ninth Circuit refused to deal the *claim* preclusion card:

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[10] See *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118 (2d Cir. 2003), overruled as to issue preclusion and claim reservation by *San Remo*, 545 U.S. at 342; *DLX, Inc. v. Kentucky*, 381 F.3d 511 (6th Cir. 2004); *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995).

[11] See *Rockstead v. City of Crystal Lake*, 486 F.3d 963 (7th Cir. 2007); *Wilkinson v. Pitkin County Bd. of County Comm'rs*, 142 F.3d 1319 (10th Cir. 1998); *Peduto v. City of N. Wildwood*, 878 F.2d 725 (3d Cir. 1989).

> [To] hold that a takings plaintiff must first present a Fifth Amendment *claim* to the state court system ... would be to deny a federal forum to every takings claimant. We are satisfied that *Williamson County* may not be interpreted to command such a revolutionary concept and draconian result. (Emphasis supplied.)

The circuits thus disagree on the application of claim preclusion following *Williamson* state proceedings, and this Court should intervene.

2. Circuit Conflict on Removal Jurisdiction. As discussed *supra* pp. 11-12, *Int'l College of Surgeons* allows a municipal defendant to remove a takings case to federal court after a plaintiff's initial state filing. However, the lower courts are split on whether they have jurisdiction to decide Fifth Amendment takings claims that have been so removed. The Seventh Circuit, on remand in *Int'l College of Surgeons*, decided it could resolve a removed federal takings claim on the merits, despite the lack of prior state litigation. *Int'l Coll. of Surgeons v. City of Chicago*, 153 F.3d 356, 360 (7th Cir. 1998). In contrast, the Eighth Circuit has held it lacked jurisdiction over a federal takings claim that a municipal defendant removed to federal court, precisely because no original state proceedings ripened the federal claim. The stunning aspect of this decision is that the federal court dismissed for lack of jurisdiction, even though the plaintiff filed initially in state court and was forced into federal court upon the city's removal motion. *Koscielski v. City of Minneapolis*, 435 F.3d 898, 903-904 (8th Cir. 2006).

See also *Jones v. City of McMinnville*, 244 Fed. Appx. 755, 2007 WL 1417293 (9th Cir. 2007) (dismissing plaintiffs' federal takings claim without prejudice after City removed the case to federal court).

The Fifth Circuit has similarly whipsawed a takings plaintiff who filed suit originally in state court, only to see a municipal defendant remove the matter to federal court — and then argue for dismissal because *Williamson*'s state-litigation rule went unsatisfied. The Fifth Circuit rewarded the city for its chutzpah by dismissing the case. *Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623, 626 (5th Cir. 2003).

"[C]onsiderations of fairness and justice" lie at the heart of the Takings Clause. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 333 (2002). It is neither fair nor just to allow a municipal defendant to remove a takings case to federal court, and then seek and receive a dismissal for lack of a prior state ripening suit. The circuits are split on how to handle removed takings cases, and this Court should address the conflict.

3. Circuit Conflict on Application of State-Litigation Rule to Other Constitutional Claims. The lower federal courts also clash on whether the state-litigation rule applies to due process and equal protection claims, in addition to takings claims. As the Petitioners did in this matter, in many constitutional property rights cases, plaintiffs assert some combination of takings, due process, and equal protection violations under 42 U.S.C. § 1983. In the case below, the court recognized that even within the

Sixth Circuit, it is unclear whether due process and equal protection claims must satisfy *Williamson*'s exhaustion requirements. *Braun*, 519 F.3d at 572. While holding that the Brauns' procedural due process claims must satisfy the exhaustion requirements, it assumed the substantive due process claims do not. Furthermore, with respect to equal protection, the court of appeals recognized that "conflicting case law exists" concerning whether *Williamson* applies. *Id.* at 574. In comparison, the Seventh Circuit has held that *Williamson*'s exhaustion requirement applies to both taking and substantive due process claims, yet not equal protection claims. *Forseth v. Vill. of Sussex*, 199 F.3d 363, 370-71 (7th Cir. 2000); See also *Ochoa Realty Corp. v. Faria*, 815 F.2d 812, 817 n.4 (1st Cir. 1987) (providing that state inverse condemnation claims must be exhausted for *both* federal takings and due process claims, without opining on equal protection.). Finally, some circuits restrict *Williamson*'s state remedies requirement to takings claims *only*.[12]

The Tenth Circuit has issued two, irreconcilable rulings on this point. It has applied *Williamson*'s

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[12] See, *e.g.*, *County Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 169 (3d Cir. 2006) ("[G]iven that the 'exhaustion of just compensation procedures' requirement only exists due to the 'special nature of the Just Compensation Clause,' it is inapplicable to appellants' facial [substantive due process] and [equal protection] claims"; citations omitted). Accord *Sinaloa Lake Owners Ass'n. v. City of Simi Valley*, 882 F.2d 1398, 1404 (9th Cir. 1989); *Front Royal and Warren County Indus. Park v. Town of Front Royal*, 135 F.3d 275, 283 n.3 (4th Cir. 1998); *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997).

state-litigation rule to takings and procedural due process claims brought under section 1983. See *Rocky Mountain Materials & Asphalt, Inc. v. Bd. of County Comm'rs of El Paso County*, 972 F.2d 309, 311 (10th Cir. 1992). Yet it has also ruled that the state-litigation rule is *not* applicable to any claims sounding in takings, due process, or equal protection, because a plaintiff "need not exhaust his available administrative remedies prior to filing a § 1983 action ...." See *Bateman v. City of W. Bountiful*, 89 F.3d 704, 708 (10th Cir. 1996).

This Court should grant the petition to provide guidance on whether the state-litigation rule encompasses due process and equal protection, as well as takings, claims.

III. *AMICUS* FRANKLIN KOTTSCHADE'S LITIGATION SAGA PERFECTLY ILLUSTRATES THE *WILLIAMSON* TRAP.

Amicus curiae Franklin P. Kottschade, a homebuilder and developer from Rochester, Minnesota, knows all too well the dilemma created by *Williamson*'s ripeness requirements. Respectfully, the Court must understand that the conflicts and confusion created by *Williamson* are not simply the stuff of law review articles, or rarefied judicial debates on jurisdictional ripeness. This issue has real world consequences. It affects families, businesses, and livelihoods. Indeed, for the past seven years, Mr. Kottschade has been trying to overcome the virtually insurmountable hurdles that *Williamson* has erected for property rights claimants.

For nearly a decade, Mr. Kottschade has endeavored to obtain just compensation from the City of Rochester, to redress what he believes was a taking of his property under this Court's precedents. Despite his good faith attempts to comply with this Court's ripeness requirements, he has been relegated to a procedural purgatory with courts at all levels in both the federal and state systems dodging the merits of his claim.

A. The City Imposes Financially Ruinous Conditions on Mr. Kottschade's Development Application, and He Initiates the Federal Suit.

In 2000, Mr. Kottschade sought to develop townhomes on a 16.4 acre parcel of land he acquired in 1992. The City of Rochester granted him a permit approval in 2000, but only if he agreed to myriad, onerous conditions.[13] These exactions had the effect of reducing the number of townhomes he could build from 104 units to 26 units, and increased the development cost for the homes from $22,000 to $90,000 per unit. Mr. Kottschade believed that the City's extortionate demands contravened precedent on unconstitutional exactions. As the Court has

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[13] Among other things, the City has demanded that Mr. Kottschade convey to the City a 50-foot public right-of-way because it might need it at some future point for a road; accept "limited access" to the expanded collector road from his development; grade the property at his expense to make it compatible with one of the City's proposed road reconstruction projects; and pay the cash equivalent of a 1.7-acre parkland dedication requirement.

ruled, development conditions imposed by land-use officials must be based on an "individualized determination" of the impacts caused by the development, and the government must prove both an "essential nexus " and "rough proportionality" – logic and balance – between the development's impacts and what the government exacts from the property owner. See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

To achieve administrative finality, Mr. Kottschade petitioned the city for relief from the conditions by seeking a variance, explaining that the conditions would render the proposed development economically unfeasible.[14] In 2001, the city upheld the development conditions and denied Mr. Kottschade's variance.

To vindicate his Fifth Amendment rights, Mr. Kottschade filed an action in the U. S. District Court for the District of Minnesota in 2001. He alleged that the permit exactions violated the takings clause

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[14] To receive a "final decision" from a land-use agency and thus render a takings claim ripe for judicial review, this Court has stated that the aggrieved property owner must pursue any administrative variances from the government's determination. See, *e.g.*, *Williamson*, 473 U.S. at 193 ("Resort to the procedure for obtaining variances would result in a conclusive determination by the Commission whether it would allow respondent to develop the subdivision in the manner respondent proposed"); *Palazzolo v. Rhode Island*, 533 U.S. 606, 609 (2001) ("A takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law").

under the *Nollan/Dolan* doctrine, and that he was therefore owed just compensation. In 2002, the district court dismissed the federal case, holding that Mr. Kottshade's claims were not ripe because he did not first exhaust litigation in the Minnesota state courts as required by *Williamson*. He then appealed to the Eighth Circuit.

B. The Eighth Circuit Affirms Dismissal of Mr. Kottschade's Federal Takings Case.

In his federal appeal, Mr. Kottschade argued that *Williamson's* state-litigation rule is contrary to *Int'l College of Surgeons'* determination that federal courts have original jurisdiction over federal takings claims. See *supra* at 11-12. He explained that if he is required to seek a state-court remedy first, he will most likely be denied a federal forum altogether under claim and/or issue preclusion. He even asked the Eighth Circuit to hold that an adverse state-court decision would not bar him from filing a subsequent federal takings claim in order to preserve his Fifth Amendment claims.

Sympathetic to a degree, the Eighth Circuit acknowledged that his "suggestion has the virtue of logic and is tempting," but ultimately declined to adopt it. *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir. 2003). The court held that it was simply too early to determine whether claim or issue preclusion would, in fact, be applied in the future. *Id.* at 1042. Ultimately, the Eighth Circuit ruled that Mr. Kottschade's claim was not ripe under *Williamson*, because he did not pursue initial state court litigation for a compensation remedy. *Id.* This

Court subsequently denied *certiorari* review. 540 U.S. 825 (2003).

C. Mr. Kottschade Remains Stuck in *Williamson*'s Procedural Quagmire — In State Court.

After Mr. Kottschade was dismissed in federal court, he pursued another round of negotiations with the city to try and salvage his project. But Rochester officials were still unwilling to budge on their financially ruinous conditions. Thus, in December 2006, Mr. Kottschade brought an action in state trial court. There, he sought mandamus relief ordering the city to commence a condemnation action to determine the damages arising from the taking. He also sought damages under 42 U.S.C. § 1983, to redress the city's violations of the Fifth and Fourteenth Amendments.

The city moved for summary judgment, arguing that Mr. Kottschade's claims were barred by the applicable six-year statute of limitations under state statute law. The initial development approval (with the unconstitutional exactions) came on July 5, 2000, and Mr. Kottschade brought his state court action on December 22, 2006. Despite clear Supreme Court precedent that pursuit of a variance is necessary before local officials render a final decision for land-use purposes, Rochester has contended that Mr. Kottschade did not need to seek a variance, and that he should have realized that the city's initial approval constituted a final decision. Of course, if Mr. Kottschade had not sought a variance, the city could just as easily have argued that he needed to pursue

that procedure as a necessary element to ripen his claim, and wielded *Williamson* and *Palazzolo* (*supra* n. 14) to argue that no final decision had been rendered.

Despite the fact that the city accepted, processed, and ruled on Mr. Kottschade's variance request, the state trial court granted the city's motion for summary judgment, concluding that the action was time-barred. That decision left him, once again, without a ruling on the constitutionality of the city's onerous permit conditions.

Mr. Kottschade is now in the midst of an appeal to the intermediate appellate level in Minnesota. He argues that the trial court erred when it determined that a variance was not necessary to achieve administrative finality under *Williamson*. Only if he prevails in this intermediate appeal will Mr. Kottschade finally have the opportunity to litigate the merits of his takings claim. If he does not, then his sole remaining options are to seek discretionary review from the Minnesota Supreme Court and this Court.

Mr. Kottschade's saga demonstrates that *Williamson* has the ironic effect of rendering constitutionally-protected property rights a fiction, because they cannot be robustly discussed, debated, and defended in federal court. Constitutional rights are made illusory in this system of municipal gamesmanship, where courts are given license to bob and weave through a jurisdictional maze that allows them to hide from the merits. Respectfully, the petition should be granted so this Court can reconfirm

that it "see[s] no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation ...." *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994).

CONCLUSION

The Court should no longer delay its reconsideration of the state-litigation rule. When *Williamson* was decided in 1985, this Court's modern takings jurisprudence was still in its infancy. Indeed, only after *Williamson*, in *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304 (1987), did this Court even decide that monetary compensation was the self-effecting remedy required by the Takings Clause. Since then, the contours of the Fifth Amendment's substantive protections have become somewhat more defined, but the most basic, fundamental jurisdictional question — "Can a federal court ever decide a federal takings claim?" — remains undeciphered. This is a question of overwhelming constitutional importance.

For the foregoing reasons, the petition should be granted.

September 24, 2008.

Respectfully submitted.

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